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55155-4194

December 22, 2016

Re: Public notice for US Steel Minntac tailings basin water permit reissuance for NPDES MN0057207

Dear Mr. Smith:

Thank you for the opportunity to review and comment on the draft US Steel Minntac tailings basin water permit reissuance for NPDES MN0057207.

Statement of Interest

Both Grand Portage and Fond du Lac Bands are federally recognized Indian tribes, as two of the member bands of the Minnesota Chippewa Tribe "(MCT"). Along with other MCT Bands, the Bands retain hunting, fishing, and other usufructuary rights that extend throughout the

entire northeast portion of the state of Minnesota under the 1854 Treaty of LaPointe[1] (the "Ceded Territory"), which encompasses in the area of the Project. In the Ceded Territory, the Bands have a legal interest in protecting natural resources and all federal agencies share in the federal government's trust responsibility to the Bands to maintain those treaty resources.[2]

Moreover, the Bands both have Treatment-in-the-same-manner-As-a-State ("TAS") status under the Clean Water Act for purposes of administering Water Quality Standards, and are downstream regulators. To the extent that there is a dispute between the state and the Bands regarding the applicable water quality standards, the Bands may seek recourse to the EPA to act as mediator between the two agencies before issuance of any CWA permit.

As we review the current draft NPDES permit, we note that it has been well over twenty years since the prior permit expired (1992), yet this facility has been allowed to not only continue operations but also undertake multiple permitted expansions, extensions and progressions of its workings while simultaneously declining to fulfill critical environmental obligations defined in a series of schedules of compliance. It is long past time for the state to fulfill its regulatory responsibilities under the Clean Water Act through issuance and enforcement of a protective permit with clear limits that timely result in compliance with Minnesota water quality standards (MN WQS). This new permit should control both surface and groundwater discharges of pollutants to hydrologically connected waters, apply the existing federally approved sulfate criterion for the protection of all affected wild rice waters, limit specific conductance to protect aquatic life, consider the effects of elevated sulfate on mercury methylation in receiving waters, and provide stringent compliance procedures consistent with the Clean Water Act.

Statement of Action

I. Definition and Authorization of Discharge

The draft permit indicates that the only discharge that requires permitting under the Clean Water Act, and the only discharge that MPCA is authorizing, is to the Dark River. Although it

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[1] Treaty with the Chippewa, 1854, 10 Stat. 1109, in Charles J. Kappler, ed., *Indian Affairs: Laws and Treaties*, Vol. II (Washington: Government Printing Office, 1904), available on-line at http://digital.library.okstate.edu/kappler/Vol2/treaties/chi0648.htm (last visited March, 2014).

[2] *See, e.g.*, Exec. Order 13175—Consultation and Coordination With Indian Tribal Governments (Nov. 6, 2000) (stating "the United States has recognized Indian tribes as domestic dependent nations under its protection . . . .," there is a "trust relationship with Indian tribes," and "[a]gencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments."), available at http://ceq.hss.doe.gov/nepa/regs/eos/eo13175.html (last visited March, 2014)

has been demonstrated that the barrier and pump-back system installed along the eastern side of the tailings basin has reduced the discharge to the Sand River and Twin Lakes by 40-60%, *the discharge has not been eliminated.* Page 20 of the "fact sheet" however, states that there has been no discharge from SD002 (the surface discharge point on the east side of the tailings basin) after 2010 when the barrier and pump back system was installed. This is patently false and must be changed.

Emailed comments from the Great Lakes Indian Fish and Wildlife Commission (GLIFWC)[3] on the pre-public notice draft NPDES permit for the Minntac tailings basin, which was distributed to a limited number of interested parties in December 2014, identified numerous sites along the exterior toe of the tailings basin dikes that "create ponded features with measurable flow". These areas of clearly visible ponded water, as seen in an attached Google Earth aerial photo, south of SD002 and connected to Admiral Lake, are connected by continuous channels to waters of the state and the U.S., and certainly meet the MPCA's own stated criteria for requiring NPDES permit controls. Yet in spite of this indisputable evidence of surface seepage, this draft permit removes all monitoring requirements at SD002.

The evidence is clear that the Minntac tailings basin is in fact a point source discharging pollutants which are impacting hydrologically connected surface waters, including Sandy Lake, Little Sandy Lake, Dark Lake, Admiral Lake, Timber Creek, the Dark River and Sand River and their tributaries and adjacent wetlands. For example, The 1854 Treaty Authority, under an agreement between the Bois Forte Band and US Steel, has been monitoring multiple locations in Little Sandy and Sandy Lakes downstream of the tailings basin[4], where harvestable stands of wild rice have been destroyed since the basin was constructed. Based on the data collected, it is apparent that the seepage capture and return system (SRCS) installed on the east side and now proposed and permitted for the west side of the tailings basin alone will never be sufficient for the basin discharge to meet MN WQS.

Year	Mean Sulfate (mg/L)	Range Sulfate (mg/L)
2010	483	360-661
2011	357	208-561
2012	207	137-275
2013	355	215-650
2014	301	180-419
2015	460	386-590
2016	289	218-374

[3] John Coleman email to Suzanne Baumann, December 19, 2014
[4] *Sandy Lake and Little Sandy Lake Monitoring (2010-2016)*, 1854 Treaty Authority report, 2016

Monitoring data that has been collected by US Steel at the discharge (SD-002) and monitoring locations in the Sand River and the Twin Lakes demonstrate that hardness, total dissolved solids, specific conductance and sulfate exceed MN WQS by an order or more in magnitude. MPCA recognizes in both the draft permit and the Fact Sheet that seepage from the Minntac tailings basin causes exceedances of surface water quality standards through hydrologically connected groundwater[5]. However, the interim limits on pages 12-13 of the draft permit appear to guarantee that US Steel will not be required to follow through with installing any tailings basin wastewater treatment, and will be allowed to continue to discharge highly polluted water for as long as the company is in operation.

But, if in fact MPCA believes that the only tailings basin discharge is to the Dark River, then the permit should *only authorize a discharge to the Dark River*, thereby allowing for a legal remedy (discharging without a permit) for the known discharge to the Sand River and Twin Lakes. The convoluted description of discharge to the Sand River, and permit limits for the Sand River and the Twin Lakes, indicate that the real purpose is to offer "permit-as-a-shield" protection to the company without providing adequate protection for the receiving waters in the form of a water-quality based effluent limits (WQBELs) or a total maximum daily load (TMDL). The permit must be re-written to accurately describe the tailings basin discharges MPCA is authorizing. If MPCA is not authorizing a tailings basin discharge to the Sand River, it must be clearly articulated in the permit.

However, the Bands note that this determination is not consistent either with the Clean Water Act *or* EPA Region 5's specific interpretations for application of the Clean Water Act to the Minntac tailings basin discharge to surface waters through hydrologically connected groundwater. In comments on the Environmental Impact Assessment for the US Steel Minntac East Pit Extension submitted to the Army Corps[6], EPA Region 5 clarified their interpretation of the CWA applicability to "discharges of pollutants from a point source to surface water that occur via directly connected ground water." EPA acknowledged that "the need for a NPDES permit is highly dependent on the facts surrounding each situation"[7], and noted that US Steel "may have installed the seep collection and return system as an approach to eliminate the surface discharge." The agency expressed concern that "such systems may not capture all of the flow to surface waters, thus resulting in continued discharges to surface waters."

EPA Region 5 clearly informed the Corps that "Section 301 of the CWA prohibits point source discharges to surface waters, either directly or via directly connected ground water, unless the discharge is in compliance with an NPDES permit". Finally, the agency states that:

[5] Minntac Tailings Basin Draft Permit, p. 22; MPCA Fact Sheet, p. 38
[6] Peter Swenson letter to Tamara Cameron, May 15, 2013
[7] 66 *Fed. Reg.* at 3,015; 63 *Fed. Reg.* at 7,881.

"To the extent that US Steel may only be converting the path through which pollutants are discharged to surface water or reducing the volume of the discharge, EPA expects that the discharges will continue to be subject to NPDES requirements. If a permit is terminated (or a discharger decides not to seek renewal of a permit) without permanent elimination of the entire discharge, the discharger would risk being found in violation of the CWA for discharge without a permit".

To further drive home this point, EPA Region 5 again clearly advised the MPCA, related to another nearby proposed mining project, that CWA Section 301 prohibits any point source discharge of pollutants to waters of the United States, either directly or via directly connected groundwater, unless the discharge complies with a NPDES permit[8].

Finally, EPA Region 5 provided comments to MPCA on the 2014 pre-public notice draft NPDES permit, expressing their concerns that:

"...this draft permit as written does not address, under MPCA's approved National Pollutant Discharge Elimination System (NPDES) program and in accordance with the Clean Water Act (CWA), all discharges to surface waters from this tailings basin. MPCA acknowledges in the fact sheet that discharges from this 8,000 acre tailings basin are causing exceedances of surface water quality standards. Based on this and facts supporting this conclusion, the CWA requires an NPDES permit for all such discharges to surface waters from the tailings basin. The original NPDES permit, which was issued in 1987, did not contemplate the full extent of the discharges to surface water from this facility. In the years between expiration of that permit and today the discharges to surface waters have continued and are better understood...[W]e are concerned that some of the statements in MPCA's draft fact sheet regarding EPA's interpretation of the scope of the NPDES program are incorrect and should be corrected prior to public notice of this draft permit.[9]

II. Wild Rice Existing Use and Applicable Criteria for Protecting Use

The state of Minnesota's existing water quality standard that limits sulfate in 'waters used for the production of wild rice'[10] to 10 mg/l was established under §303 of the CWA and approved by EPA Region 5 in 1973. When the Minnesota Legislature attempted to revise this standard in 2011, Region 5 unambiguously advised them that this was a federally approved standard that could only be changed through a federal review process, to ensure protection of the

[8] EPA NorthMet SDEIS Comment Letter 3-13-2014
[9] EPA Region 5, letter of Kevin Pierard, Chief, NPDES Programs Branch, to Ann Foss, Minnesota Pollution Control Agency (December 19, 2014)
[10] Minn. R. 7050.0224, Subp. 2

beneficial use of waters that support wild rice.[11] But the MPCA is specifically declining to apply this existing, approved water quality standard in the draft permit, citing a law passed by the Legislature during special session in 2015 that states "the agency shall not require permittees to expend money for design or implementation of sulfate treatment technologies or other forms of sulfate mitigation."[12] The MPCA is in violation of the federal Clean Water Act by neglecting to impose the sulfate standard to the Minntac tailings basin discharge.

The Fact Sheet does not reveal the known occurrence of wild rice in Dark Lake, although multiple state agency[13] and university field crews[14] have documented its presence – and therefore confirmed that it is an existing use - over the past several years. Water quality standards for protection of wild rice should be applicable to this watershed as well as the Twin Lakes, where it is well-established that both Sandy and Little Sandy Lakes are wild rice waters[15]. Wild rice has been confirmed by the 1854 Treaty Authority downstream of the surface water monitoring point SW001 (Sand River at Highway 53). Historic vegetation surveys by the MN DNR and more recent surveys by the 1854 Treaty Authority confirm the dramatic degradation of the wild rice populations in the Twin Lakes[16] in the decades since the Minntac tailings basin was constructed and began discharging pollutants into the surrounding waters.

The MPCA should revise the draft permit to require compliance with the existing federally-approved sulfate standard (10 mg/l) in Sandy and Little Sandy Lakes and the Sand River. The agency should affirm that wild rice production is an existing use in the Dark River watershed, and apply the wild rice sulfate standard here as well.

III. Permit and Schedule of Compliance Must Contain Interim Limits for all Pollutants that have the Potential to Exceed WQS

Under the federal Clean Water Act, impaired waters are defined as "lakes, river or stream segments with monitored violations of one or more numeric and/or narrative water-quality standards". Each NPDES permit must include those conditions necessary to "achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality."[17] The permit limits must control all pollutants or parameters which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality

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[11] EPA Region 5, letter of Tinka Hyde, Water Division Director, to Senator Thomas Bakk and Representative David Dill (May 13, 2011)
[12] 2015 Minn. Laws 1st Sp. Sess. Ch. 4, Art. 4, Sec. 136.
[13] MPCA, Gerald Blaha emails to MPCA, Stephanie Handeland and Darren Vogt, 1854 Treaty Authority regarding Dark Lake wild rice, June 20, 2013- September 6, 2013
[14] Myrbo et al. Field Survey and Field Survey Excerpt of Sites Near Minntac Tailings Basin
[15] MPCA, Draft List of MPCA Wild Rice Waters – October 26, 2015; MDNR, Natural Wild Rice in Minnesota, a Wild Rice Study document submitted to the Minnesota Legislature, Feb. 15, 2008, Appendix B, pp. 80-81
[16] 1854 Treaty Authority Report , 2016
[17] 40 C.F.R. §§122.44(d)(1) 123.25(15).

standard.[18] Although both the draft permit and fact sheet discuss the reasonable potential for a discharge to cause or contribute to an excursion from water quality standards (WQS), the reasonable potential analysis is only applied to the Dark River, and only for WQS applicable to Class 3 and 4 (Industrial and Agricultural Uses). Neither the Fact Sheet or draft NPDES permit clearly state the applicable Class 2 (Aquatic Life Use) and trout stream (Class 2A) limits for the Dark River watershed.

Minnesota Rules for protecting Class 2 waters states:

> For all class 2 waters, the aquatic habitat, which includes the waters of the state and stream bed, shall not be degraded in any material manner . . . the normal fishery and lower aquatic biota upon which it is dependent and the use thereof shall not be seriously impaired or endangered, the species composition shall not be altered materially, and the propagation or migration of the fish and other biota normally present shall not be prevented or hindered by the discharge of any sewage, industrial waste, or other wastes to the waters.[19]

The draft permit provides no analysis of any impacts to aquatic life, and includes no water quality based effluent limitations (WQBELs) to protect fish or other aquatic biota in any of the Class 2 waters that are impacted by the discharge from the Minntac tailings basin. The MPCA applies only Class 1B drinking water standards and Class 4B agricultural standards (adult livestock drinking water) for sulfate (250; 1000 mg/l) and total dissolved solids (700 mg/l); Class 4A agricultural standards for bicarbonates (250 mg/l) and specific conductance (1000 µS/cm); and Class 3C industrial standards for calcium and magnesium as hardness (500 mg/l) and chlorides (250 mg/l).

In 2011, EPA published a report, *Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams*, reviewed and approved by its Science Advisory Board, which concludes that high conductivities (mixtures of ions, dominated by calcium, magnesium, sulfates and bicarbonates) were associated with impaired aquatic communities[20]. Subsequent peer-reviewed studies examined the causal factors of this relationship, established threshold for protection of aquatic life, and demonstrated a link between mining in the watershed and elevated conductivity. A chronic aquatic life benchmark of 300 µS/cm for waters in Appalachian ecoregions was established, and further reviews concluded that the benchmark and the methodology used to derive it may be applicable in other ecoregions with appropriate validation.

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[18] 40 C.F.R. §122.44(d)(1)(i)
[19] Minn. R. 7050.0150, Subp. 3
[20] U.S. EPA, *A Field--Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams*, Office of Research and Development, National Center for Environmental Assessment, Washington, DC., 2011 EPA/600/R-10/023F, p. viii,

Following up on that line of study, EPA published draft guidance this month to assist states and authorized tribes to derive numeric limits to protect aquatic life from the acute and chronic effects of elevated ionic concentration, measured as specific conductance.[21] The Conductivity Criteria Methods draft confirms that elevated specific conductance is causally related to reduced benthic macroinvertebrate (BMI) community metrics, and that aquatic life criteria should be calculated based upon survival of 95% of the BMI genera. EPA's Office of Research and Development reviewed an analysis performed by two retired Minnesota environmental regulatory staff, which applied the EPA methodology to large datasets from northeastern Minnesota ecoregions[22]. This analysis concluded that the 300 µS/cm benchmark established for Appalachian streams would likely result in extirpation of 5% or more of the BMI genera, and EPA's review validated their conclusions.[23] In summary, these analyses strongly suggest that a more restrictive specific conductance limit should be derived and applied in this permit to protect aquatic life in waters that are impacted by Minntac tailings basin discharges.

Many, if not all, of the "monitor only" pollutants in the draft NPDES permit have been measured to exceed MN WQS, as demonstrated in Minntac's own Data Monitoring Reports. These pollutants must have interim limits and final limits that comply with MN WQS. Discharge monitoring reports over a long period of record point to manganese as another constituent of concern for likelihood of exceedance of Minnesota's drinking water standard, yet there are no limits on manganese in Class 1 waters in this draft permit. The MPCA must include interim and final limits for manganese, iron, fluoride, specific conductance, chloride, and sulfate, because all of these pollutants have exceeded MN WQS as detailed in Minntac's own data monitoring reports and provided to MPCA.

IV. Compliance Schedule Exceeds One Year and Does Not Contain Final Compliance Date or Pollutant Concentrations

The schedule of compliance offered in this draft permit allows more than one year to develop a plan to reduce pollutants to surface water, and three years for groundwater. This is unacceptable because, as is plainly obvious when reviewing multiple previous schedules of compliance for this facility, beginning in 1989, US Steel has already been granted twenty-seven years to come up with a plan to reduce pollutants being released to surface and groundwater. And, during that period of time they have pilot-tested multiple treatment approaches. Yet, US Steel Minntac has never been required to install and use any of the treatment options they have been given time to study (and freedom from actual compliance) during the previous 27 years.

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[21] EPA, *Public Review Draft, Field-Based Methods for Developing Aquatic Life Criteria for Specific Conductivity*, December 2016

[22] Johnson & Johnson, *An Evaluation of a Field-Based Aquatic Life Benchmark for Specific Conductance in Northeast Minnesota* (November 2015) prepared for WaterLegacy

[23] EPA, Susan Cormier, Office of Research and Development, Review Memo "An Evaluation of a Field-Based Aquatic Benchmark for Specific Conductance in Northeast Minnesota," Feb. 2, 2016

As defined in CWA rules regarding Schedules of Compliance:

40 C.F.R. § 122.47. Schedules of compliance.
(a) *General (applicable to State programs, see § 123.25).* The permit may, when appropriate, specify a schedule of compliance leading to compliance with CWA and regulations.

(1) *Time for compliance.* Any schedules of compliance under this section shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA.

(2) The first NPDES permit issued to a new source or a new discharger shall contain a schedule of compliance only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three years before commencement of the relevant discharge. For recommencing dischargers, a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three years before recommencement of discharge.

(3) *Interim dates.* Except as provided in paragraph (b)(1)(ii) of this section, if a permit establishes a schedule of compliance which exceeds 1 year from the date of permit issuance, the schedule shall set forth interim requirements and the dates for their achievement.

(i) **The time between interim dates shall not exceed 1 year,** except that in the case of a schedule for compliance with standards for sewage sludge use and disposal, the time between interim dates shall not exceed six months.

(ii) If the time necessary for completion of any interim requirement (such as the construction of a control facility) is more than 1 year and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

(4) *Reporting.* The permit shall be written to require that no later than 14 days following each interim date and the final date of compliance, the permittee shall notify the Director in writing of its compliance or noncompliance with the interim or final requirements, or submit progress reports if paragraph (a)(3)(ii) is applicable.

The first condition for the March 31, 1972 "Permit for Construction and Operation of Disposal System" (the original Minntac tailings basin permit) states: "No effluent shall be discharged from the system to surface waters of the State.[24]" It is not clear from our review of archived documents related to the US Steel Minntac facility when, and why, the tailings basin was first permitted to allow substantial volumes of polluted effluent to be discharged into the surrounding surface and ground waters. It is clear, however, that the state regulatory agencies have long been aware of the risk posed to downstream wild rice resources, and that US Steel has been enabled to avoid enforcement of applicable MN Water Quality Standards for decades by

[24] Permit WPC 7248, dated March 31, 1972.

simply being required to 'study' their discharge flows and pollutant concentrations[25]. Yet the Fact Sheet states:

> The Permittee has already conducted significant site investigation and research into treatment and remedial technologies under a series of SOCs since 2001. It is difficult to schedule a timeframe for implementation of a remedy when the nature and scale is unknown.[26]
>
> In March 2009 USS submitted an NPDES Permit Application that included plans to construct a 7000 gallon per minute Process Water Treatment System (PWTS), in part to satisfy a 2008 Stipulation Agreement for line 3 hardness issues. USS predicted the PWTS would lower the basin sulfate concentration from 900 to 350 mg/L in one permit cycle. USS then requested MPCA not act on the application while it investigated refinements to the proposed PWTS. Instead, USS proposed replacement of wet emissions scrubbers on the pelletizing furnaces with dry controls. This would remove a significant source of pollutants to the basin (as well as reduce air emissions) and was forecast to lower the basin sulfate concentration to 476 mg/L within 20 years. The phased installation of dry controls, beginning with line 6, was included in a June 9, 2011, Schedule of Compliance (SOC). In 2015, USS informed MPCA it did not intend to install dry controls.[27]

The Fact Sheet also documents multiple violations discovered during the most recent compliance inspection of the tailings basin, including violations of limits on sulfate and hardness deposited in the tailings basin[28]. Minntac's long history of violations of schedules of compliance, and rejection of commitments to construct a wastewater treatment system or replace wet scrubbers, is a compelling reason to ensure that this permit contains clear and enforceable limits to *timely* reduce the discharge of pollutants to surface and groundwater.

Chapter 1. (Compliance Schedule) of the draft permit provides five years to achieve a sulfate concentration of 800 milligrams per liter, a concentration approximately four times higher than the drinking water standard. In ten years, sulfate is supposed to be reduced to 357 milligrams per liter, about 30 percent higher than the 250 milligram per liter drinking water standard. Since the issuance of the very first NPDES permit for Minntac's tailings basin in 1987, the company has been required through multiple, successive Compliance Schedules to repeatedly study and determine the sources of sulfate and hardness. However, *none of the Compliance Schedules issued during the previous 27 years have required compliance with MN WQS, or have contained a date when compliance must be attained.* This Schedule of Compliance is no different. The Schedule of Compliance in this permit must require the company to select and install treatment technologies within one year of permit reissuance.

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[25] See, eg.: Jess Richards letter to Kevin Pierard re: Response to Comments on Draft Schedule of Compliance US Steel Minntac (Nov. 28, 2007); Minnesota DNR Status Report: *Sulfate Sampling in Waters Receiving Seepage from the USX Tailings Basin*, (1 March 1988); Minnesota DNR Final Report: *Sulfate Release from the USX Tailings Basin and Quantification of Sulfate Sources* (August 1991).
[26] MPCA Fact Sheet, p. 37
[27] *Id.*, p. 6
[28] MPCA, Compliance Status Minntac Tailings Basin (2010)

Summary of Statement of Action

1) The draft permit and fact sheet must plainly describe the discharge(s) MPCA is authorizing under this NPDES permit. 40 CFR § 122.44, "the reasonable potential for a discharge to cause or contribute to an excursion of WQS" must be applied to all of the surface waters where MPCA authorizes discharges.

2) "Monitor only" must be removed from the permit because most, if not all, of the pollutants that are listed as "monitor only" have exceeded MN Water Quality Standards as demonstrated in Minntac's data monitoring reports. These pollutants must have interim limits until compliance with MN WQS can be attained. A benchmark criterion for specific conductance to protect aquatic life should be applied in this permit.

3) The Compliance Schedule must require the selection and installation of wastewater treatment within one year of permit reissuance, and include dates when final effluent limits must be achieved.

4) Existing uses must be protected in all of the surface waters surrounding the Minntac tailings basin, not just the uses that MPCA has designated.

5) Wild rice waters must be protected by enforcing the existing standards, including the 10 milligrams per liter sulfate standard, unless and until MPCA and US EPA have approved and implemented new criteria.

Sincerely,

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Nancy Schuldt
Fond du Lac Water Projects Coordinator

Cc. Rebecca Flood, MPCA
Kevin Pierard, Chris Korleski - U.S. EPA
Chad Konickson, Tim Smith - U.S. Army Corps of Engineers
Constance Cummins - U.S. Forest Service
Jennifer Engstrom - MNDNR